

# Breach of Warranty in the Sale of Real Property: *Johnson v. Healy*

## I. INTRODUCTION

The *Johnson v. Healy*<sup>1</sup> decision radically changed the law of real property sales in Connecticut and its impact may reach all contract law. In *Johnson*, the Supreme Court of Connecticut, using a theory of express warranty, imposed liability upon the builder-vendor of a home that had sustained structural damage because of uneven settling of its foundation. Although it is not unusual for liability in damages to result from a breach of warranty in a real estate transaction, the two notable features of this decision are (1) the court's construction of seeming sales "puffery" as an express warranty, and (2) the court's disregard for basic elements of a contract action, such as examination of the writing, the statute of frauds, the parole evidence rule, and the merger doctrine.

The builder-vendor, defendant Healy, purchased a building lot in 1963. Unknown to Healy, the lot was not solid land but had been improperly filled sometime prior to his purchase. During the course of negotiating the sale of the house, Healy told plaintiff Johnson that "the house was made of the best material, that he had built it, and that there was nothing wrong with it."<sup>2</sup> Relying on these representations, plaintiff purchased the house for \$17,000. Because of the improper fill, the house settled unevenly and sustained damage to its foundation and walls. To correct the damage, the plaintiff expended \$882.50 for sewer repairs and \$5,112 for repairs and capital improvements to the house itself. The plaintiff filed suit asking for damages equal to the amount spent on sewer repairs plus \$27,150 to construct a new foundation for the house. The trial court held the builder-vendor liable on the theory of "express warranty co-extensive with the doctrine of implied warranty"<sup>3</sup> of workmanship and habitability and awarded \$5,000 damages.

The legal foundation for the *Johnson* decision is difficult to decipher. The court traced the history of liability for innocent misrepresentation and found that liability could be based in both contract and tort.<sup>4</sup> The court, however, did not articulate whether liability was premised on either of these substantive bases. Instead, it used a number of theories and blurred the elements of various causes of action, concluding that the statement "there was nothing wrong with the house" constituted an express warranty and that liability for innocent misrepresentation, even in the form of a general opinion, could be based upon warranty principles. The court thus appears to believe that innocent misrepresentation and express warranty

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1. 176 Conn. 97, 405 A.2d 54 (1978).

2. *Id.* at 98-99, 405 A.2d at 55.

3. *Id.* at 99, 405 A.2d at 56.

4. *Id.* at 100, 405 A.2d at 56.

are different names for one cause of action.<sup>5</sup> This approach is flawed. Elements of misrepresentation are different under tort and contract, as are elements of warranty and remedies. Express warranty and innocent misrepresentation, although similar, are not interchangeable.

Although the court makes only a brief citation to section 552 C of the Restatement Second of Torts, this section might be one possible basis for the court's confusion between misrepresentation and express warranty. The section provides:

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from action in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

(2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.<sup>6</sup>

This section has come under attack as a minority rule that has no place in the Restatement.<sup>7</sup> It creates no new basis for liability, but merely provides a different "restitutionary" measure of damages and permits a contract action to be determined under a tort theory without benefit of contract defenses. "[T]he kind of innocent misrepresentation made actionable in tort by section [552C] would almost always be a warranty as that term is defined by the [Uniform Commercial] Code and thus subject to the Code's provisions applicable to warranties, including the Code's version of the parol evidence rule."<sup>8</sup> "If the buyer insists on keeping what he obtained under the contract and sues for damages arising from the breach of what is essentially a term of the contract, it would seem that he is claiming a right under the contract, and that his claim ought to be controlled by contract law."<sup>9</sup> Contract law requires addressing the issues of

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5. *Id.* at 100, 405 A.2d at 56.

6. RESTATEMENT (SECOND) OF TORTS § 552C (1977).

7. Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40, 41 (1974). Hill refers to the Restatement section as 524A, which is essentially the same as § 552C. He quotes from RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 3, 1958) in footnote 2:

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from action in reliance upon it, is subject to liability to the other for the harm caused by his justifiable reliance upon the misrepresentation, even though it is made without knowledge of its falsity or negligence.

(2) If such a misrepresentation is made without knowledge of its falsity or negligence, the damages recoverable for it are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.

8. Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40, 42 (1974).

9. *Id.* at 47-48.

complete integration, merger clauses, parol evidence, and the statute of frauds.

In its effort to provide relief to the plaintiff, the court in *Johnson* bypassed established legal remedies and failed to explain the potential consequences this decision could have upon contract actions and social policy. The court extended the concept of express warranty beyond its common definition to include a statement that appears to more closely resemble a seller's opinion or puff. It ignored the parol evidence rule, the statute of frauds, and questions of integration by treating the action as one in tort rather than breach of contract. The court also failed to make clear whether it judicially imposed an implied warranty of workmanship and habitability, and if it did, how this judicially imposed implied warranty will harmonize with the present statutory implied warranty.<sup>10</sup> Additionally, the court appears to have opened the way for contract defenses to be disregarded in any type of breach of contract action by treating the action as a tort.

The court did not need to depart from traditional legal reasoning in order to find the builder-vendor liable in this case. In addition to the more traditional analysis of express warranty, there are five other theories upon which the court's decision could have been based. First, the court could have applied the doctrine of caveat emptor, holding that the plaintiff had no cause of action because he undertook the risk of quality and condition of the real estate when he purchased the house without express warranties in the contract of sale. Second, the court could have applied the theories of misrepresentation and mutual mistake and granted rescission of the contract. Third, application of a negligence theory would have led the court to the same outcome. Fourth, the court could have imposed strict liability upon builder-vendors as to the condition of the subsoil. Finally, the court could have imposed an implied warranty of workmanship and fitness for a particular purpose to the construction of new homes.

This Comment will examine the alternatives the court had available but chose to ignore and the consequences of the course of action that the court pursued.

## II. CAVEAT EMPTOR

Probably the easiest way to dispose of the *Johnson* case would have been to apply the doctrine of *caveat emptor* and refuse the plaintiff recovery. *Caveat emptor* has been the traditional American rule of law in the normal sale of lands and old buildings. Although the doctrine as applicable to real estate transactions has been abrogated in many jurisdictions,<sup>11</sup> it still retains some vitality. At common law, unless a purchaser of real estate protected himself by having express warranties put

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10. See CONN. GEN. STAT. ANN. § 52-563a (West 1980 Supp.).

11. See 46 CIN. L. REV. 207 (1977).

into the contract of sale or the deed of conveyance, the property passed from seller to purchaser without any express or implied warranties. The law assumed that the purchaser was able to inspect the property and properly protect himself against defects. Application of this doctrine, however, would have been an about-face for the court, for it had been chipping away at the doctrine of *caveat emptor* for several years.<sup>12</sup> The court recited that in Connecticut "*caveat emptor* has not been allowed to stand in the way of imposition of liability for negligent misrepresentation."<sup>13</sup> The court also stated that in *Scribner v. O'Brien, Inc.*<sup>14</sup> it explicitly ended the role of *caveat emptor* in sales of new homes by builder-vendors when it recognized the propriety of claims for negligence, express warranty, and in dictum, implied warranty.<sup>15</sup>

The *Johnson* case, however, can be factually distinguished from the cases relied on by the court to deny application of *caveat emptor*. Unlike those cases, *Johnson* dealt with innocent misrepresentations rather than negligence or negligent misrepresentations. *Caveat emptor* has never been a defense to a tort action alleging negligence, but it is a defense to an action for breach of contract in the sale of real estate.

The court alluded to policy considerations underlying the rejection of the doctrine of *caveat emptor* but never fully explained its position. In analogizing warranties for real property to warranties accompanying the sale of goods under the Uniform Commercial Code,<sup>16</sup> the court asserted its unarticulated bias that consumers should be provided a measure of warranty protection when making purchases of real estate similar to that provided in the sale of goods. Nevertheless, by failing to clearly express its intention in referring to the U.C.C. or the public policy it sought to further, the court did not formulate a rule of law that clearly extends such protection.

### III. MISREPRESENTATION

Misrepresentation is defined as any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.<sup>17</sup>

A warranty differs from a representation in that a warranty must always be given contemporaneously with, and as part of, the contract; whereas a representation precedes and induces the contract. . . . [U]pon breach of warranty . . . the contract remains binding, and damages only are recoverable for the breach, whereas, upon a false representation, the defrauded party may elect to avoid the contract, and recover the entire price paid.<sup>18</sup>

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12. *Johnson v. Healy*, 176 Conn. at 102, 405 A.2d at 57.

13. *Id.* at 102, 405 A.2d at 57.

14. 169 Conn. 389, 363 A.2d 160 (1975).

15. *Johnson v. Healy*, 176 Conn. at 102, 405 A.2d at 57.

16. *Id.* at 100, 405 A.2d at 56.

17. BLACK'S LAW DICTIONARY 1152 (4th ed. 1968).

18. *Id.* at 1758.

The existence of misrepresentation in a contract action may have one of three effects: the contract may be voidable; grounds for reformation may be present; and, in rare cases, formation of any contract at all may be prevented.<sup>19</sup> For misrepresentation to result in making a contract voidable, four things must be shown: (1) there was a misrepresentation; (2) the misrepresentation was either fraudulent or material; (3) the misrepresentation induced the recipient to make the contract; and (4) the recipient's reliance on the misrepresentation was justified.<sup>20</sup> There is a difference between misrepresentation in contract and misrepresentation in tort. Under tort law, a misrepresentation does not give rise to liability unless it is *both* fraudulent *and* material, while under contract law, a misrepresentation may make a contract voidable if it is *either* fraudulent *or* material.<sup>21</sup> A misrepresentation is material if the maker should know that it is likely to induce the recipient to manifest his assent because it would be likely to induce a reasonable person to do so.<sup>22</sup> A misrepresentation is fraudulent if the maker knows or believes his assertion is not in accord with existing facts, does not have confidence in the truth of his assertion, or knows that he does not have a basis for his assertion.<sup>23</sup>

The proper remedy for misrepresentation in contract is rescission and restitution.<sup>24</sup> The plaintiff returns the house in exchange for the purchase price. Closely akin to the theory of misrepresentation is mutual mistake, which also provides for rescission and restitution. Mutual mistake regarding the existence of the subject matter of a contract is always ground for avoidance of the contract.<sup>25</sup> Mutual mistake could exist in *Johnson* only if the court found that the subject matter of the contract was the *quality* of the land and the fitness of the house for habitation.

The court, however, did not rescind the contract and restore the parties to their precontract state. Instead, the contract remained intact and the court recited the general rule of contract damages—that plaintiff should receive such compensation as would place him in the same position as he would have enjoyed had the property been as warranted. The court limited damages to diminution of value in order to avoid economic waste.<sup>26</sup> The remedy of damages instead of rescission and restitution would have been appropriate only if the court found the misrepresentation to be both fraudulent and material, as required for liability under tort law. The facts substantiated a finding of materiality, but not fraud.

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19. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note, Chapter 14, Topic 1 at 3 (1976).

20. *Id.*, Introductory Note, Chapter 13, Topic 1 at 4.

21. *Id.* § 306, Comment a. *Cf.* RESTATEMENT (SECOND) OF TORTS § 538 (1977) (in tort law, reliance upon a fraudulent misrepresentation is not justifiable unless the matter represented is material).

22. RESTATEMENT (SECOND) OF CONTRACTS § 304, comment c (1976).

23. *Id.* § 304. In fraud, reliance does not have to be reasonable. In the leading case of *Chamberlin v. Fuller*, 59 Vt. 247, 9 A. 832 (1887), the court made this point:

"No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."

24. RESTATEMENT (SECOND) OF CONTRACTS § 306 (1976).

25. L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS (2d ed. 1965).

26. 176 Conn. at 105, 405 A.2d at 58.

## IV. NEGLIGENCE

The court in *Johnson* cited *Warman v. Delaney*<sup>27</sup> and *Richard v. Waldman*<sup>28</sup> for the proposition that *caveat emptor* had not been allowed to stand in the way of imposition of liability for negligent misrepresentations. Both cases concerned misrepresentations regarding the location of property boundary lines. These cases, however, can be distinguished from the *Johnson* case. The court in *Johnson* found that the defendant could not have been negligent, having had neither actual knowledge nor constructive notice of the soil defects.<sup>29</sup> Finding that "test borings to determine soil suitability were not customary for residential construction,"<sup>30</sup> the court held that the claims of negligence could not be sustained<sup>31</sup> because the defendant did not have a duty to know the truth about the condition of the subsoil.

The California case of *Sabella v. Wisler*,<sup>32</sup> which is factually similar to the *Johnson* case, imposed liability upon a builder-vendor using the theory of negligence. In *Sabella*, the court found the builder liable for negligently constructing a house upon a lot that had formerly been a quarry site, but had been filled with dirt and rock prior to the defendant's purchase. The fill material was placed over an accumulation of tree cuttings that had not been properly compacted. Damage resulted to the house from uneven settling. The builder-vendor's liability was founded solely upon negligence in construction of the house rather than upon any alleged misrepresentation or implied warranty. Although the defendant did not specifically contract to construct the house for the plaintiffs, the court held that the defendant owed the plaintiffs a duty of care in construction because they were members of the class of prospective home buyers for which defendant built the house.<sup>33</sup> Liability was predicated on the foreseeability of harm to prospective owners when a house is constructed upon inadequately compacted earth. The court found negligence because the builder began construction without soil inspection when such an inspection would have disclosed the lack of compaction, even though the appearance of the land at the time of purchase would not have alerted a reasonably prudent person to the existence of fill material in the lot.<sup>34</sup>

Although the *Sabella* court made no reference to standards and practices within the building industry regarding the use of soil inspection tests, the *Johnson* court specifically stated such tests were not customary

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27. 148 Conn. 469, 172 A.2d 188 (1961).

28. 155 Conn. 343, 232 A.2d 307 (1967).

29. 176 Conn. at 103, 405 A.2d at 57.

30. *Id.* at 103, 405 A.2d at 57.

31. *Id.* at 103-04, 405 A.2d at 57-58.

32. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

33. *Id.* at 28, 377 P.2d at 893, 27 Cal. Rptr. at 693.

34. *Id.* at 25, 377 P.2d at 891, 27 Cal. Rptr. at 691.

for residential construction.<sup>35</sup> Standards that are customary in an industry, however, do not necessarily define the standard of care required of a reasonably prudent person.<sup>36</sup> The *Johnson* court could have followed the lead of the California court by imposing a duty to know the condition of the subsoil prior to construction and basing a finding of negligence upon defendant's lack of reasonable care in ascertaining the condition of the subsoil.

## V. STRICT LIABILITY

Strict liability is a tort theory that imposes liability upon the party best able to shoulder it.<sup>37</sup> In strict liability, the defendant is held liable merely because the responsibility should be his as a matter of social adjustment.<sup>38</sup>

A finding of strict liability in the *Johnson* case would have allocated the loss to the class of builder-vendors because the builder-vendor was in a superior position to ascertain the condition of the subsoil before beginning construction. From a policy standpoint this basis for liability is just. The builder-vendor has by far the better opportunity to examine the suitability of the home site and to determine what measures should be taken to prepare the soil in order that a home fit for habitation can be constructed. Imposition of strict liability would protect purchasers of newly constructed homes as a class.

The Supreme Court of New Jersey has developed a theory of strict liability applicable to builder-vendors of mass produced homes. This theory was articulated in *Schipper v. Levitt & Sons, Inc.*,<sup>39</sup> in which the court imposed liability upon the builder-vendor for injuries sustained by the child of the purchaser's lessee when he was scalded by excessively hot water drawn from the bathroom faucet. The court held that public policy dictated that the cost of injury resulting from defective construction should be borne by the developer, who created the danger and was in a better economic position to bear the loss, rather than by the injured party. In placing the burden on plaintiff to show that the house was defective when constructed and sold, the court held the test of defectiveness was reasonableness rather than perfection.

## VI. EXPRESS WARRANTY

The court stated that the basis of the *Johnson* decision was breach of express warranty. The court imposed liability upon the builder-vendor by finding that he made an express warranty of workmanlike construction and fitness for habitation,<sup>40</sup> analogizing the case to that of an express

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35. 176 Conn. at 103, 405 A.2d at 57.

36. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33 at 166-68 (4th ed. 1971).

37. *Id.* § 75 at 495.

38. *Id.*

39. 44 N.J. 70, 207 A.2d 314 (1965).

40. 176 Conn. at 99, 405 A.2d at 56.

warranty of goods under the U.C.C.<sup>41</sup> Specifically, the court relied on U.C.C. section 2-313.<sup>42</sup> According to that section, an affirmation of fact or a promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain constitutes an express warranty. After directing the reader's attention to the U.C.C., it would seem logical for the court to explain the relationship between the express warranty in *Johnson* and U.C.C. 2-313. The court, however, did not do this and at no time analyzed the statement in question to determine if it had all the elements of an express warranty.

Instead, the court applied an analysis of misrepresentation, not warranty, to the facts. Throughout the opinion, the court stated that plaintiff *relied* upon defendant's representation and was thereby *induced* to enter into the contract of sale. Reliance and inducement to enter into the contract are elements of misrepresentation. Warranty no longer has a strict reliance factor, but has been replaced by the requirement that the warranty be "part of the basis of the bargain."<sup>43</sup> Although actual reliance is more than sufficient to satisfy the requirement that the statement be part of the basis of the bargain, the court used the terminology of misrepresentation, not that of warranty.

Defendant made a statement "that the house was made of the best material, that he had built it, and that there was nothing wrong with it."<sup>44</sup> On first impression, this statement appears to be mere seller's "puff." The distinction between an express warranty and a statement of opinion or seller's puffery may be a very fine line, but the court did not examine the statement in question to see if it was an affirmation of fact or a promise.

In holding that the defendant's statement constituted an express warranty, the court stated that "[a]lthough *indefinite*, the defendant's statement that there was 'nothing wrong' with the house could reasonably have been heard by the plaintiff as an assertion that the defendant had sufficient factual information to justify his *general opinion* about the quality of the house."<sup>45</sup> It is hard to reconcile the language of the court that

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41. *Id.* at 100, 405 A.2d at 56.

42. CONN. GEN. STAT. ANN. § 42a-2-313 (West 1980 Supp.) (U.C.C. § 2-313) provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

43. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-2 at 273 (1972).

44. 176 Conn. at 98-99, 405 A.2d at 55.

45. *Id.* at 102-03, 405 A.2d at 57 (emphasis added).



describes the statement as indefinite and of general opinion with its holding that the statement was an express warranty. A seller's statement regarding quality is usually a statement of opinion.<sup>46</sup> The comments to section 310 of the Restatement Second of Contracts point out:

[t]he propensity of sellers and buyers to exaggerate the advantages to the other party of the bargains they promise is well recognized, and *to some extent their assertions must be discounted*. Nevertheless, while some allowance must be made for seller's puffing and buyer's depreciation, the other party is entitled to assume that a *statement of opinion is not so far removed from the truth as to be incompatible with the facts known to the maker*. Where circumstances justify it, a statement of opinion may also be reasonably understood as carrying with it an assertion that the maker knows facts sufficient to justify him in forming it.<sup>47</sup>

In *Johnson*, the defendant had no knowledge of facts incompatible with his statement that there was "nothing wrong" with the house. The defendant's statement appears to be the kind of general opinion of quality that should not be relied upon because of sellers' tendency to puff about their products. In finding an express warranty in the words "nothing wrong" with the house, it appears that the builder warranted the house to be perfect. This could not have been the builder-vendor's intent, and giving the statement such an interpretation would not justify the plaintiff's reliance thereon.

The pre-Code case of *Mikulo v. Lucibello*<sup>48</sup> is an example of statements of opinion that did not create a warranty. In *Mikulo*, the court held the defendant's statement that "[t]his car is in A-1 condition; I just overhauled the motor"<sup>49</sup> did not constitute an express warranty but was merely seller's talk. In analogizing the U.C.C. express warranty of goods to real estate transactions, the *Johnson* court apparently construed seller's puffery more restrictively in the case of a builder-vendor of real estate than in the case of a seller of goods.

A Connecticut common pleas court considered the distinction between an express warranty and a statement of general opinion in *Graveline v. Posin*.<sup>50</sup> It held that a declaration made by defendant to plaintiff that "to his knowledge the house drains were adequate [to keep the cellar dry],"<sup>51</sup> was not sufficient to establish an express warranty of the house by the defendant. In the *Graveline* case, the court had before it the contract of sale in which "plaintiff agreed that she had examined the premises; that she was fully satisfied with the physical condition thereof; and that neither the seller nor any representative of the seller made any representation or promise on which the purchaser relied concerning the

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46. RESTATEMENT (SECOND) OF CONTRACTS § 310, comment c (Tent. Draft No. 11, 1976).

47. *Id.* § 310, comment d (emphasis added).

48. 17 Conn. Supp. 360 (1951).

49. *Id.* at 361.

50. 31 Conn. Supp. 316, 329 A.2d 368 (1974).

51. *Id.* at 319, 329 A.2d at 370.

condition of the property.”<sup>52</sup> The contract also contained a merger clause that no oral statement or promise or any understanding not embodied in the writing would be valid. Although the plaintiff introduced evidence regarding the defendant’s statement and presented bills relating to water in her basement, she was unsuccessful in rebutting the merger clause.

The type of representation made in the *Graveline* case is not significantly different from the representation made in the *Johnson* case; however, the cases are readily distinguishable by the manner in which the courts analyzed the law and applied the facts to the law. The *Graveline* court analyzed the statement alleged to be a warranty and referred to the contract provisions under the contract law. In the *Johnson* case, the court apparently did not have the contract of sale before it. Except for one brief reference to the contract,<sup>53</sup> the court ignored the writing itself in reaching its decision regarding imposition of liability for express warranty.<sup>54</sup> An action on a written contract inherently requires examination of the actual writing.

It is significant that the court failed to mention how it reached the determination that an express warranty had been made without considering either the parol evidence rule or the statute of frauds, or examining the actual written contract of sale. In general, the parol evidence rule renders inoperative prior written agreements when there is a binding integrated agreement.<sup>55</sup> Evidence, however, is admissible to modify an agreement that is not completely integrated. In the *Johnson* case, the parties did not address the issue whether the sales contract constituted an integrated agreement. The court is silent about whether the agreement contained a valid merger clause or whether it constituted a completely integrated agreement.

The parol evidence rule provides for certain exceptions when considering agreements and negotiations prior to, or contemporaneous with, the adoption of a writing. Evidence is admissible to establish:

- (a) that the writing is or is not an integrated agreement;
- (b) that the integrated agreement, if any, is completely or partially integrated;
- (c) the meaning of the writing, whether or not integrated;
- (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating causes;
- (e) ground for granting or denying rescission, reformation, specific performance or other remedy.<sup>56</sup>

The oral representation that there was “nothing wrong” with the

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52. *Id.* at 319, 329 A.2d at 370.

53. 176 Conn. at 99, 405 A.2d at 56. The defendant was held liable despite the absence of written warranties concerning the fitness or condition of the home in the contract of sale or the deed of conveyance.

54. *Id.* at 103, 405 A.2d at 57.

55. RESTATEMENT (SECOND) OF CONTRACTS § 329 (Tent. Draft No. 5, 1970).

56. *Id.* § 240.

house was not offered under any of the above exceptions. Instead, it was alleged that the representation was made during the course of negotiations for the purpose of inducing the plaintiff to enter into the contract of sale. The court in *Richard v. Waldman*<sup>57</sup> held that evidence regarding the defendant's misrepresentations was admissible despite the defendant's argument that the terms of the sales contract were merged into and superseded by the deed. The court stated "[s]ince this count . . . is construed to validly state a cause of action based on a material misrepresentation in the *inducement* of the contract, it is not concerned in changing the contract in any way."<sup>58</sup> In *Richard*, the court permitted the admission of evidence under an inducement exception to the parol evidence rule. Conversely, in *Graveline v. Posin*<sup>59</sup> a contract containing a merger clause withstood allegations of express warranties made for the purpose of inducement to make the contract.

The Restatement Second of Contracts provides that an agreement is not completely integrated if it omits a consistent, additional, agreed upon term that, under the circumstances, might be omitted from the writing.<sup>60</sup> By way of illustrating terms that are omitted naturally, the Restatement provides that "[w]arranties of title, conformity to the description, merchantability or fitness for a particular purpose, arising under U.C.C. §§ 2-312 through 2-315, are not excluded"<sup>61</sup> under the parol evidence rule. The illustration provides that whether any additional oral warranty of quality is superseded by written agreement depends upon whether the agreement is integrated. The defendant's statement that there was "nothing wrong" with the house cannot come under the exceptions specifically noted in the illustration because the sale of real estate is not covered by the U.C.C.

The court made a serious omission in not first determining whether the parties had entered into an integrated agreement regarding the sale of this real estate. If the agreement had been found to be integrated, the court would have needed to formulate a specific exception to the parol evidence rule before admitting the evidence of the defendant's representation. Since the statement is the basis for the cause of action, this was a necessary first element of the court's analysis. The court also ignored the statutory requirement that any agreement for the sale of real property be in writing.<sup>62</sup> In order to constitute an enforceable part of the agreement for the sale of real estate, the express warranty necessarily had to be in writing to

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57. 155 Conn. 343, 232 A.2d 307 (1967).

58. *Id.* at 348, 232 A.2d at 310 (emphasis added).

59. 31 Conn. Supp. 316, 329 A.2d 368 (1974).

60. RESTATEMENT (SECOND) OF CONTRACTS § 240 (Tent. Draft No. 5, 1970).

61. *Id.* § 242, illustration 9.

62. CONN. GEN. STAT. ANN. § 52-550 (West 1980 Supp.) provides:

No civil action shall be maintained . . . upon any agreement for the sale of real estate . . . unless such agreement, or some memorandum thereof, is made in writing and signed by the party to be charged therewith or his agent. . . .

comport with the statute of frauds. Thus, the court ignored the elements of parol evidence and the statute of frauds in deciding what was purportedly a cause of action brought under a breach of contract theory.

It is significant that the court ignored the first part of the defendant's representations that "the house was made of the best material, that he built it."<sup>63</sup> The court specifically found that "damage which the house sustained because of its uneven settlement was due to improper fill which had been placed on the lot beneath the building at some time before the defendant bought the lot."<sup>64</sup> There was no evidence that the damage to the house resulted from poor or shoddy workmanship on the part of the defendant builder. In addition, the court found the defendant not guilty of negligence in constructing the house. If one can conceive of severing the house from the subsoil, the defendant could not be held liable for breach of warranty of the house itself. The defect was in the subsoil and not within the construction or materials in the house. Although it is arguable that the soil (and subsoil) upon which a house stands are implicit in the definition of a house, the court in *Scribner v. O'Brien*<sup>65</sup> held that an express warranty covering a "dwelling" did not extend to the garage and driveway. If "common meaning and usage"<sup>66</sup> of the word "dwelling" permitted the court to narrowly limit the scope of the warranty in *Scribner*, it follows that an equally limited warranty could have been construed in *Johnson*.

In effect, the court has made the builder-vendor an insurer of the quality of the subsoil upon which he builds. But unlike the theory of strict liability, express warranty imposes liability only if the seller makes a statement concerning the quality of the house. Such statements will invariably be made. Settling of a house is ordinarily thought to be the result of natural causes. Absent specific findings of negligence or defective workmanship the builder's liability would not extend to damage due to natural causes.

In *Salowitz v. Squillacote*,<sup>67</sup> the builder-vendor was found liable for breach of an express one-year guarantee against defects. The builder defended on the ground that the damage resulted from natural causes. The court held, however, that:

Natural forces, such as shrinkage and settlement, operating on the buildings as they actually were constructed may have produced these consequences but the consequences arose from faulty workmanship and materials actually involved in construction which were unable to resist the forces of nature.<sup>68</sup>

In the *Johnson* case, improper materials and workmanship were not the cause of damage to the house. The court found the cause of damage to be uneven settling of the fill material. Implicit in the passage quoted above

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63. 176 Conn. at 98, 405 A.2d at 55.

64. *Id.* at 99, 405 A.2d at 55-56.

65. 169 Conn. 389, 363 A.2d 160 (1975).

66. *Id.* at 399, 363 A.2d at 166.

67. 10 Conn. Supp. 220 (1941).

68. *Id.* at 223.

is the converse of the *Salowitz* holding, namely, that liability will not be imposed if the damage resulted solely from natural causes absent faulty workmanship. The *Johnson* court failed to distinguish between settling of land in its undisturbed condition and settling of land that has been filled. Arguably, the fill created an artificial condition that caused the settlement to lose the immunity of "natural causes"; however, the court failed to address this issue. As the *Johnson* decision stands, it apparently does not matter if the soil settles in its natural condition or has been filled with proper or improper material. Liability may be imposed if the builder-vendor makes a representation regarding a building upon any type of land.

## VII. IMPLIED WARRANTY OF WORKMANSHIP AND HABITABILITY

Courts most commonly find a builder-vendor liable by imposing implied warranties of workmanlike construction and fitness for habitation.<sup>69</sup> Some jurisdictions, however, will impose the implied warranties only when the vendee purchases an uncompleted house from the builder, conditioned upon completion, or when the vendee contracts with the builder to have a house built to specifications. This was the basis of *Miller v. Cannon Hills Estates, Ltds.*,<sup>70</sup> in which the court found that in a contract for the construction of a house there was an implied warranty that the house would be built in an efficient and workmanlike manner and of proper materials and would be fit for habitation.

The law in Ohio follows the dichotomy between completed and uncompleted houses. Although recognizing that a contract to construct a house implies a warranty that the house would be reasonably fit for its intended use and that the work would be done in a workmanlike manner, Ohio courts have held that a vendor of a completed house undertakes no obligation regarding the condition of the dwelling unless express warranties are made.<sup>71</sup> In a factual situation such as the *Johnson* case,

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69. 46 CIN. L. REV. 207, 212 n.39 (1977) provides a list of 24 states that have displaced *caveat emptor* with some form of consumer protection:

*Cochran v. Keeton*, 287 Ala. 439, 252 So. 2d 313 (1971); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970); *Gable v. Silver*, 258 So. 2d 11 (Fla. App. 1972); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Week v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Theis v. Heuer*, 149 Ind. App. 52, 270 N.E.2d 764 (1971); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969); *Weeks v. Slavik Builders Inc.*, 24 Mich. App. 621, 180 N.W.2d 503 (1970); *Smith v. Old Warsaw Dev. Co.*, 479 S.W.2d 795 (Mo. 1972); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Hartley v. Ballous*, 20 N.C. App. 493, 201 S.E.2d 712 (1974); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Yepsen v. Burgess*, 269 Ore. 635, 525 P.2d 1019 (1974); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972); *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969); *Tavares v. Hortsman*, 542 P.2d 1275 (Wyo. 1975).

70. [1931] 2 K.B. 113.

71. *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957).

Ohio courts would not impose implied warranties of workmanlike construction and fitness for habitation because the house was completed when sold. However, the builder-vendor might be held liable under a theory of negligence. The Ohio Supreme Court used a negligence theory in *Mitchem v. Johnson*<sup>72</sup> to find the builder-vendor liable for damage that resulted from surface water and installation of a defective roof. In *Mitchem* the court held that *caveat emptor* continued to apply to real estate transactions that did not involve construction contracts, but concluded that a builder-vendor could be liable for damages if his conduct in constructing the house did not comport with that of an "ordinarily prudent person under all the circumstances."<sup>73</sup> Absent a finding of negligence in the builder-vendor's conduct, an Ohio court would probably not impose liability.

In Texas, the builder-vendor impliedly warrants that a house has been constructed in a good workmanlike manner and is suitable for human habitation. The implied warranty theory was used in *Humber v. Morton*<sup>74</sup> to place liability upon a builder-vendor when the new house was partially destroyed by fire the first time the fireplace was used. The case of *Lincoln v. Pohly*<sup>75</sup> placed liability upon the builder-vendor for breach of express warranty and breach of implied warranty of workmanship. Express warranties were found in the builder-vendor's statements that "[T]his house will be completed right," and "I will get a crew here and get everything fixed up for you just right."<sup>76</sup> Here, although a breach of express warranty theory was used, the statements are not more readily recognized as warranties than was the representation in the *Johnson* case that "there is nothing wrong with the house."

The basis of the *Johnson* decision is that "the defendant had made an express warranty coextensive with the doctrine of implied warranty of workmanship and habitability in cases involving the sale of new homes by a builder."<sup>77</sup> This language is ambiguous. It is unclear whether the court found an express warranty at the same time that it found an implied warranty of workmanship and habitability, or whether the court merely meant to state that the express warranty it found was delimited by the doctrine of implied warranty of workmanship and habitability.<sup>78</sup> Although the court chose to be ambiguous in its language, the decision is in agreement with prior cases and statutory law if the court simply meant that the express warranty was delimited by the doctrine of implied warranty.

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72. 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

73. *Id.* at 72, 218 N.E.2d at 599.

74. 426 S.W.2d 554 (Tex. 1968).

75. 325 S.W.2d 170 (Tex. Civ. App. 1959).

76. *Id.* at 171.

77. 176 Conn. at 99, 405 A.2d at 56.

78. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 160 (1971) defines coextensive as "having the same spatial or temporal scope of boundaries."

Additional weight is given to this interpretation when the language is carefully examined. The court found an express warranty coextensive with the *doctrine* of implied warranty and not coextensive with the warranty itself. The court also stated that the "trial court found that defendant's representations . . . amounted to an *express warranty of workmanlike construction and fitness for habitation*."<sup>79</sup> Following this interpretation, breach of the express warranty found in the seller's statement that "there was nothing wrong"<sup>80</sup> with the house should be determined using the same criteria that would be used to find a breach of the implied warranty that the "building shall be erected in a workmanlike manner and in accordance with good usage and the accepted practices in the community in which the construction and the work are done."<sup>81</sup> The builder-vendor will not be held to an obligation to deliver a perfect house, but any defects must be readily remediable.<sup>82</sup>

The court's intention, however, is far from clear. If the court meant to impose a judicially implied warranty of workmanship and habitability it should have done so in plain language. The court does not explain the implied warranty, to whom and from whom it runs, whether it is governed by a statute of limitations, or when it will be imposed. This may have been merely sloppy draftsmanship or perhaps the court felt it did not have to explain this area of the law because it could base the decision upon a finding of express warranty.

If the court judicially imposed an implied warranty, it failed to reconcile this warranty with the statutory implied warranty for real estate found in Connecticut General Statutes section 52-563a.<sup>83</sup> The statutory implied warranty has a three-year statute of limitations that begins to run from the date the occupancy certificate is issued. The statutory implied warranty is inapplicable to *Johnson* because the certificate of occupancy was issued January 12, 1966, but the defendant did not receive notice of any claim until December 20, 1970 and suit was not filed until March 1, 1971. Although the statutory implied warranty of workmanship and habitability does not purport to be the exclusive and only implied warranty in this area, it does reflect the legislature's probable intention to pre-empt this area of law.

Moreover, a finding of a judicially imposed implied warranty of

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79. 176 Conn. at 99, 405 A.2d at 56 (emphasis added).

80. *Id.* at 98-99, 405 A.2d at 55.

81. *Vernalis v. Centrella*, 28 Conn. Supp. 476, 479, 266 A.2d 200, 202 (1970).

82. *Theis v. Heuer*, 264 Ind. 1, 10, 280 N.E.2d 300, 305 (1972), *quoting* *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

83. CONN. GEN. STAT. ANN. § 52-563a (West 1980 Supp.) provides:

The issuance by the building department of any municipality of a certificate of occupancy for any newly constructed single-family dwelling shall carry an implied warranty to the purchaser of such dwelling from the vendor who constructed it that such vendor has complied with the building code or the customary application and interpretation of the building code of such municipality. No action shall be brought on such implied warranty but within three years next from the date of the issuance of such certificate of occupancy.

workmanship and habitability is inconsistent with the court's position a year earlier in *Coburn v. Lenox Homes*.<sup>84</sup> In *Coburn*, the court recognized that the imposition of an implied warranty in the sale of new homes is a socioeconomic decision best formulated by the legislature.<sup>85</sup>

### VIII. POLICY CONSIDERATIONS

The way in which the *Johnson* court answered the question of who should bear the loss caused by a defective condition in the subsoil will have far reaching public policy effects. For this reason the question deserved to be addressed squarely. The court should have clearly articulated the public policy it intended to promote. The court's decision, although perhaps equitable as applied to the particular facts of the case, failed to formulate a policy that will address the equities in all builder-vendor/purchaser controversies.

The court stated that "[e]xtension of warranty liability for innocent misrepresentation to a builder-vendor who sells a new home is, *as a matter of policy*, consistent with the developing law of vendor and purchaser generally."<sup>86</sup> In *Scribner v. O'Brien Inc.*,<sup>87</sup> decided three years earlier and cited in the *Johnson* case, the court referred to the "overwhelming trend" in other jurisdictions of invoking the doctrine of implied warranty of workmanship and habitability in cases involving the sale of new homes by builders. The court apparently sees injustice in providing protection in the form of implied warranties under the U.C.C. to the buyer of a defective ten dollar good, while denying protection to a purchaser making a major investment in real estate. If, however, the *Johnson* court created an implied warranty of workmanship and habitability that survives the three-year statute of limitations found in Connecticut General Statutes section 52-563a, it did so by inference and not by a clear statement.<sup>88</sup> It also created uncertainty for builder-vendors who now may be subject to liability under this judicially implied warranty indefinitely or at least as long as the original purchaser continues in ownership.

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84. 173 Conn. 567, 378 A.2d 599 (1977).

85. *Id.* at 573, 378 A.2d at 602:

A determination that the builder-vendor should be liable to subsequent purchasers under an implied warranty theory for defective construction requires a *policy determination that the builder-vendor should be held liable, regardless of fault, for economic losses*. In other words, such a determination requires a judgment that the cost of such losses should fall on the class of builder-vendors. While that determination may properly be made by a court in . . . exceptional circumstances . . . and under the broad socioeconomic pressures which have led to the general growth of theories of strict liability, a *judicial extension of implied warranty theory is not appropriate here. The legislature . . . has provided for a limited warranty, which it apparently felt properly allocated the burden of economic loss between builder-vendor and the purchasers of homes.* (emphasis added.)

86. 176 Conn. at 102, 405 A.2d at 57 (emphasis added.)

87. 169 Conn. 389, 363 A.2d 160 (1975).

88. See text at VII *supra*.



The *Scribner*<sup>89</sup> case cited *Elderkin v. Gaster*,<sup>90</sup> in which the court noted:

Most of the cited cases supporting the theory of implied warranty of reasonable workmanship and habitability were factually concerned with structural defects, rendering the home unfit for habitation. In several cases, however, the implied warranty of habitability was found to have been breached not because of structural defects, but because of the unsuitable nature of the site selected for the home.<sup>91</sup>

In one such case, breach of an implied warranty of workmanship and habitability by the builder-vendor was found when the house was damaged by settling.<sup>92</sup> The dwelling in that case was built upon a steep slope that was considered stabilized. There had been no land or mud slides in the area for the previous fifteen years and conditions causing the slides were thought to be corrected. The condition of the soil, however, caused the floors, basement walls and foundation to slip and crack, rendering the house unfit for further occupancy. Although the court found that the contractor had used reasonable skill and diligence in constructing the house, it nevertheless held:

As between vendor and purchaser, the builder-vendors, even though exercising reasonable care to construct a sound building, had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install. Although hindsight, it is frequently said, is 20-20 and defendants used reasonable prudence in selecting the site and designing and constructing the building, their position throughout was markedly superior to that of their first purchaser-occupant. To borrow an idea from equity, of the innocent parties who suffered, it was the builder-vendor who made the harm possible. If there is a comparative standard of innocence, as well as culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer.<sup>93</sup>

The concepts of innocence and culpability are not applicable to situations in which liability is imposed for breach of warranty, yet the basis of the *Johnson* decision appears to rest upon an intuitive feeling that the equities of the case required the builder-vendor to bear the loss. The court could have broadened its decision to require the class of builder-vendors to bear this type of loss by imposing strict liability and justified the holding with policy reasons. Instead, the court neither presents a clear policy statement nor an easily decipherable rule of law.

The court never makes clear whether liability is imposed because the lot had previously been filled and was an artificial condition or whether the

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89. 169 Conn. 389, 363 A.2d 160 (1975).

90. 447 Pa. 118, 288 A.2d 771 (1972).

91. *Id.* at 129, 288 A.2d at 777.

92. *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1968).

93. *Id.* at 435-46, 457 P.2d at 204.

builder-vendor was liable for any natural settling of the house, if damage resulted. Apparently, the builder has become an insurer of the subsoil, but only if he makes a representation as to quality of the house. If this is the result the court intended to reach, it would have been simpler to place an affirmative duty upon the builder-vendor to know the condition of the subsoil or hold the builder-vendor strictly liable for any uneven settling. The court placed a greater burden upon the builder-vendor than can be met by soil boring tests and reasonable safeguards in construction. If the *Johnson* decision is construed as imposing a judicially implied warranty of workmanship and habitability, a builder-vendor may be liable for *any* subsoil condition.

If, however, the *Johnson* case rests only on a holding of breach of express warranty, the court's noble efforts to protect the real estate purchaser may not be realized. The case puts builder-vendors on notice to keep quiet because innocent sales puffery will be strictly construed as express warranties. This may lead to more circumspect sales negotiations and possibly even less protection for purchasers of real property if builder-vendors become overly cautious in their representations about the property. The theory of express warranty is an inadequate way to extend protection to purchasers of real estate from builder-vendors.

#### IX. CONCLUSION

In *Johnson v. Healy* the Supreme Court of Connecticut not only dealt a death blow to the doctrine of *caveat emptor* in the sale of real property by a builder-vendor, but it also created uncertainty in Connecticut law—invalidating contract defenses in cases involving breach of warranty by treating the action as a tort. The court confused tort and contract theories and remedies when it found a breach of express warranty based upon tort liability and analyzed under the theory of misrepresentation. It complicated the law of implied warranties in real estate by ambiguously implying that a judicially imposed warranty may coexist with the statutory provision without harmonizing the two.

Applying the theory of breach of express warranty to the *Johnson* case was an inadequate way to provide protection to purchasers of new homes. It requires that a representation concerning the quality of the house actually be made and be part of the basis of the bargain before the consumer is protected. Although the trial court's finding of no negligence probably foreclosed application of that theory of liability, the court should have chosen a more efficient and clear way to impose liability. The theory of strict liability would have provided protection to purchasers of new homes as a class. This would furnish certainty in defining liability in builder-vendor/purchaser relationships. A judicially implied warranty of workmanship and habitability would have provided protection to the purchasers and permitted the court flexibility. This theory of liability,

however, would need careful formulation in order to reconcile the existing statutory implied warranty.

The abrogation of contract defenses in this breach of warranty action presents questions that may affect the entire law of contracts. There are strong policy arguments against using tort law to determine when a contract is enforceable.

[T]he position . . . has implications that are not limited to contract disputes arising from an innocent misrepresentation. Once it is recognized that the representation complained of is in effect promissory, and untainted by willful deception, negligence, or other fault, the question presents itself whether, in the context being considered, there is a principled basis for distinguishing the breach of this particular promise from the breach of any other promise.<sup>94</sup>

The court has clouded the nature of an action for breach of warranty. How much vitality do the contract defenses and standard for measuring breach retain?

Following the *Johnson* decision, Connecticut law is in a state of chaos. *Caveat emptor* is dead, but what has replaced it as the rule of law? Only the Connecticut Supreme Court seems to know—and it's not telling.

*Kay Woods*

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94. Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40, 44 (1974).

